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In the
Supreme Court of the United States

October Term, 1975

Case No. 75-1359

DEMOCRATIC EXECUTIVE COMMITTEE
OF COLUMBIANA COUNTY, ET AL.,
Petitioners,

v.

TED W. BROWN, SECRETARY OF
STATE OF OHIO,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a party who institutes suit in state court and presents his federal claims to that court for its determination has the right to relitigate those claims in federal court if he is not satisfied with the determination of the state court.

STATEMENT

Petitioner, Democratic Executive Committee of Columbiana County, Ohio (the committee herein), pursuant to the provisions of Section 3501.07 of the Ohio Revised Code, filed with respondent, Ted W. Brown, the Secretary of State, its recommendation that petitioner, Don R. Gosney, be reappointed as a member of the Board of Elections of Columbiana County for a four-year term commencing March 1, 1974. Section 3501.07, *supra*, is set forth in the Petition.

The Secretary of State refused to accept the recommendation. He found that Mr. Gosney would have a potential conflict of interest if he were appointed to the board of elections since he was employed by a congressman who would be a candidate for election in Columbiana County.

The committee and Mr. Gosney instituted separate actions in the state Supreme Court to compel the Secretary of State to appoint Mr. Gosney to another four-year term. They claimed that the statute violated their rights to due process of law because it allowed the Secretary of State to make decisions concerning recommendations for appointments to the boards of elections without notice or a hearing.

The court issued an alternative writ and a temporary restraining order in each action which prohibited and restrained the Secretary of State, until further order of the court, from declaring a vacancy in the board of elections by reason of his refusal to reappoint Mr. Gosney and from filling said vacancy. Copies of these Entries are set forth as Appendices A and B hereto.

The Secretary of State moved to dismiss both actions on the ground that they failed to state a claim upon which relief could be granted. The court sustained the motion and dismissed the action instituted by Mr. Gosney. A copy of the dismissal entry is attached to the Petition at

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A-11. Under Ohio law such a dismissal constitutes an adjudication of the merits of the claim. *State ex rel. Kopchak* v. *Lime*, 44 Ohio St.2d 3 (1975).

Mr. Gosney did not attempt to obtain review of that decision in this Court.

The court, in *State ex rel. Democratic Executive Committee* v. *Brown*, 39 Ohio St.2d 157 (1974), also denied relief in the action instituted by the committee. It found that under the standards set forth in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sinderman*, 408 U.S. 593 (1972), there was no requirement for notice and hearing. It also found that there had been no abuse of discretion by the Secretary of State.

The committee did not attempt to seek review of that decision in this Court.

The committee and Mr. Gosney then instituted a joint action in federal District Court. They again alleged that Section 3501.07, *supra*, violated their constitutional rights. A three-judge court found that their claims were barred by the doctrine of *res judicata*. The opinion of the District Court is contained in the Petition at A-4.

On appeal to this Court, the case was remanded with directions that a new order be entered to permit a timely appeal to the Court of Appeals.

On appeal to the Court of Appeals, the Secretary of State moved to affirm the decision of the District Court, pursuant to Rule 8 of the Rules of the Sixth Circuit, on the ground that the questions raised by the appeal were unsubstantial and required no further argument. The court granted the motion. The Order of the Court of Appeals is contained in the Petition at A-1.

ARGUMENT

Petitioners are unable to show any of the considerations set forth in Rule 19 of the Rules of this Court, or any

other reason why this Court should review the decision of the Court of Appeals. There is no conflict of decision. This Court has repeatedly held that a party who presents a federal claim to a state court for determination may not relitigate that claim in federal court. See, e.g., *Angel* v. *Bullington*, 330 U.S. 183, 188-190 (1947); *Grubb* v. *Public Utilities Comm.*, 281 U.S. 470, 477-478 (1930); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923); *Mertes* v. *Mertes*, 350 F.Supp. 472, 474-475 (D. Del. 1972) *affd.* 411 U.S. 961 (1973); cf. *England v. Louisiana St. Bd. of Med. Exam.*, 375 U.S. 411, 419 (1964).

The Courts of Appeals which have considered the question have reached the same conclusion. *Lovely* v. *Laliberte*, 498 F.2d 1261 (1st Cir. 1974); *Thistlethwarte* v. *City of New York*, 497 F.2d 339 (2d Cir. 1974); *Jack's Fruit Co.* v. *Growers Mkt. Service*, 488 F.2d 493 (5th Cir. 1973); *Chasteen* v. *T.W.A., Inc.*, 520 F.2d 714 (8th Cir. 1975); *Scoggin* v. *Schrunk*, 522 F.2d 436 (9th Cir. 1975); *Spence* v. *Latting*, 512 F.2d 93 (10th Cir. 1975). See also cases cited in *Ellis* v. *Dyson*, 95 S.Ct. 1691, 1699 n. 6 (1975) (Powell, J., dissenting).

Cream Top Creamery v. *Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967), is readily distinguishable. The plaintiff in that case instituted a private antitrust suit alleging continuing price discrimination by the defendant. Federal courts have exclusive jurisdiction of claims arising under the antitrust acts. The prior action in state court did not, and could not, determine those claims. In addition each transaction of price discrimination would constitute a separate legal wrong. Transactions occurring after the dismissal of the state suit created new causes of action which would not be affected by the prior judgment. (383 F.2d at 363-364.)

The instant case involves neither exclusive federal jurisdiction nor a series of separate transactions which

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continued subsequent to the dismissal of the state court suit. Federal courts do not have exclusive jurisdiction over alleged violations of the due process clause. State courts have equal jurisdiction to determine questions involving rights arising under the Federal Constitution. *Robb* v. *Connolly,* 111 U.S. 624, 637 (1884).

Petitioners do not contend that the claims raised by Mr. Gosney in the state court were different from those raised by the committee. Their claim is that the dismissal of his action was not a decision on the merits. This is an incorrect interpretation of the applicable state law. A dismissal of the complaint and denial of the writ, without any qualifying language in the order, constitutes an adjudication on the merits. *State ex rel. Kopchak* v. *Lime, supra,* 44 Ohio St.2d at 4.

In any event the determination that Mr. Gosney is in privity with the committee is clearly correct. There was a complete representation of his rights and interests in the state court proceeding. The opinion of the state court shows that the right which the committee raised, and which the court adjudicated, was the right of Mr. Gosney to be appointed to the board of elections. Mr. Gosney is, therefore, in privity with the committee and is precluded from relitigating his rights in federal court. *Chicago R. I. & P. R. Co.* v. *Schendel,* 270 U.S. 611, 618 (1925); *Hart Steel Co.* v. *Railroad Supply Co.,* 244 U.S. 294, 298 (1917); *Hackman* v. *United States,* 224 U.S. 413, 445-446 (1912).

Even if petitioners' claims were not foreclosed by the doctrine of *res judicata,* they would not present an important question of federal law. Because of the alternative writs and temporary restraining orders issued by the state Supreme Court, Appendices A and B hereto, Mr. Gosney remained a member of the board of elections. He was, therefore, afforded a full hearing by the state's highest court on the validity of his alleged deprivation before he suffered any loss whatsoever.

In addition the interests for which petitioners seek protection are not sufficient to constitute a property right or a liberty interest within the meaning of the due process clause. Under the applicable Ohio law, Mr. Gosney had no right to be appointed to the board of elections prior to the approval of the appointing authority, the Secretary of State. *State ex rel. Democratic Executive Committee* v. *Brown, supra,* 39 Ohio St.2d at 159.

Petitioners' real claim is that they feel that the reputation of Mr. Gosney has been injured because the Secretary of State refused to reappoint him. An injury to a person's reputation does not deprive him of any federally protected right. *Paul* v. *Davis,* 44 L.W. 4337 (1976).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. DEMOCRATIC COMMITTEE OF COLUMBIANA COUNTY, *Relator,* *vs.* TED W. BROWN, SECRETARY OF STATE, *Respondent,*	To wit: February 19, 1974 No. 74-147 ENTRY

This matter came on for hearing on the application of Relator for an alternative writ of mandamus and a temporary restraining order and on consideration thereof, an alternative writ of mandamus is hereby granted, and Respondent is hereby prohibited and restrained until further order of this Court from declaring a vacancy in the Board of Elections of Columbiana County by reason of the refusal of Respondent to reappoint Don R. Gosney as referred to in the complaint and from filling said vacancy, as prayed for in the complaint filed in this cause, and said Respondent is directed to show cause before this Court on or before the 1st day of March, 1974, why he should not be permanently prohibited from so doing and why a permanent writ of mandamus should not issue ordering Respondent to appoint Don R. Gosney to the Columbiana County Board of Elections for a four (4) year term commencing March 1, 1974, and expiring February 28, 1978.

C. WILLIAM O'NEIL

Chief Justice

THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. DON R. GOSNEY, *Relator,*	To wit: February 19, 1974
vs.	No. 74-148
TED W. BROWN, SECRETARY OF STATE, *Respondent.*	ENTRY

This matter came on for hearing on the application of Relator for an alternative writ of prohibition and a temporary restraining order and on consideration thereof, an alternative writ is hereby granted, and Respondent is hereby prohibited and restrained until further order of this Court from declaring a vacancy in the Board of Elections of Columbiana County by reason of the attempted refusal of Respondent to reappoint Relator as referred to in the complaint and from filling said vacancy, as prayed for in the complaint filed in this cause, and said Respondent is directed to show cause before this Court on or before the 1st day of March, 1974, why he should not be permanently prohibited from so doing and why he should not be permanently prohibited from refusing to confirm the appointment of Relator and/or appoint him as a member of the Columbiana County Board of Elections.

C. WILLIAM O'NEIL
Chief Justice

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